IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0131
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
GARY BRIAN ABEL,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-46294

Honorable Kenneth Lee, Judge
Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and David A. Sullivan — Tucson
Attorneys for Appellee

Steven P. Sherick — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Gary Abel was convicted after a jury trial held in his absence of three counts of child molestation. The trial court sentenced him to presumptive, consecutive, seventeen-year prison terms on each count. He argues his convictions must be vacated because the indictment was duplicitous and improperly amended and because there was insufficient evidence to support the guilty verdicts. He also maintains one of the charges was never presented to a jury; there was a fatal variance between the evidence before the grand jury and the evidence at trial; and the trial court erred when it refused to continue the sentencing and failed to conduct an analysis of whether his sentences should have been concurrent rather than consecutive. For the following reasons, we affirm his convictions and sentences.

¶2 On appeal, we view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions. *State v. Le Noble,* 216 Ariz. 180, ¶ 2, 164 P.3d 686, 687 (App. 2007). In June 1994, Abel lived with his fiancée, Susan, and her daughter, C., who turned seven years old that month. One night, Susan walked into the living room and saw Abel "fooling with the zipper on his shorts." C. was standing nearby with a scared look on her face. Susan took C. into another room and learned that Abel had been molesting her. Susan and C. immediately left the home and Susan called the police a few days later to report the incidents.

¶3 Before the grand jury, Tucson Police Detective Karen Fuller testified that, based on interviews of C., her mother, and Abel, between August 1993 and June 1994 Abel

had, "on two or three occasions," made C. rub his penis until her hands would be red.[1] Fuller testified that on another occasion, Abel had rubbed his penis on C.'s genitals. And, yet another time, C. had rubbed Abel's penis until he ejaculated. Finally, Fuller testified that Abel and C. had been in a bathroom and Abel had licked C.'s vulva, had rubbed her genitals with his hand, and had rubbed his penis on her genitals. Based on this testimony, the grand jury charged Abel with six counts of child molestation and two counts of sexual conduct with a minor under the age of fifteen.

¶4 On the first day of trial, Abel and the state stipulated to the dismissal of counts two and six, which had charged Abel with causing C. to touch his penis and engaging in oral contact with her vulva, respectively. Although the state contended it believed the testimony adduced at trial would support counts two and six, which alleged Abel had committed acts identical to those set forth in counts one and five, the state agreed counts two and six could be dismissed in order to avoid any potential of a nonunanimous verdict.[2] After stipulating to dismiss these counts, Abel's counsel also stipulated he had "no problem with the remaining counts, at least in terms of the way they are charged." The court then implied it would renumber the remaining counts of the now six-count indictment.

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[1]Fuller also testified about what was potentially a fourth touching incident but Abel was only charged with three counts of causing C. to touch his penis.

[2]The trial court previously had granted the state's motion to amend counts two and six to allege the incidents had occurred at a different time than the conduct in counts one and five, but it appears the indictment was never so amended.

¶5 At trial, C. testified she had touched Abel's penis one time and then Abel masturbated and she saw some "white stuff" come out of his penis.[3] She further testified that Abel touched her genitals with his penis one time and, on another occasion, touched her genitals with his fingers on the bed in the back bedroom. C. also stated that Abel had licked her vulva in the back bathroom up on the counter. Detective Fuller testified that Abel admitted to her that he had shown C. his penis and had let her touch it on her request. Fuller also testified about a letter Abel had written to the Pima County Attorney, in which Abel admitted that on one occasion, he let C. play with his penis, got aroused, and then moved away and grabbed a tissue.

¶6 After the close of the evidence, Abel moved for judgment of acquittal on all counts. The court granted his motion on count three, which alleged that C. had rubbed Abel's penis, because C. testified at trial that she did not rub his penis but had only touched it with her fingers. The court also "dismiss[ed] Count 6 because it was multiplicitous." The jury found Abel not guilty of the count alleging he had put his mouth on C.'s vulva but convicted him of the three remaining counts: causing C. to touch his penis, rubbing his penis on C.' s genitals, and rubbing C.'s genitals with his hand. Abel was arrested in February 2006 and sentenced in April of that year. This appeal followed.

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[3]C. used the term, "front bottom" to refer to both male and female genitalia. For clarity and consistency, we use the same terms used in the indictment, "vulva," "genitals," and "penis."

Count One

Duplicity of Indictment

¶7 Abel argues his conviction on count one must be vacated because it was duplicitous. We review de novo whether an indictment is duplicitous. *United States v. Yarbrough*, 852 F.2d 1522, 1530 (9th Cir. 1988); *see also State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005). A duplicitous indictment charges more than one crime in a single count and is prohibited because it "fail[s] to give adequate notice of the charge to be defended, present[s] the potential of a non-unanimous jury verdict, and make[s] a precise pleading of prior jeopardy impossible in the event of a later prosecution." *State v. Anderson*, 210 Ariz. 327, ¶ 13, 111 P.3d 369, 377 (2005).

¶8 Abel contends that "what in the original indictment had been . . . three or four crimes was . . . presented to the jury in one count." He alleges the original indictment was duplicitous and the problem was compounded when count two was dismissed and a judgment of acquittal was entered on count three.[4] But the jury was not presented with evidence of three or four crimes involving C. touching Abel's penis. Rather, it was presented with conflicting versions of one incident of touching: C.'s version and Abel's. Abel wrote in a letter to the county attorney that he had allowed C. to touch his penis, got aroused, and then moved away and grabbed a tissue. C. testified she touched Abel's penis once and that

[4]Count six was dismissed as multiplicitous but Abel does not appear to argue this affected the alleged duplicity of count one.

once after Abel touched it, he had ejaculated. Because C.'s testimony was not clearly describing a different act than the one Abel described, we disagree with Abel's assertion he "was convicted on a charge for which the jury was presented evidence of two different acts."

¶9 By contrast, in *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), which Abel relies on to support his claim, the defendant was charged with and convicted of one count of having sexual intercourse with a person under fifteen but the jury heard testimony clearly describing two different incidents that occurred approximately eleven days apart. *Id.* ¶¶ 54-61, 79 P.3d at 76-77; *see also Spencer v. Superior Court*, 136 Ariz. 608, 609, 667 P.2d 1323, 1324 (1983) (finding a two-count indictment for incest and child molestation duplicitous that "actually charged as many as one hundred separate offenses"). In light of the testimony that was actually presented at trial, the amended indictment did not charge Abel with more than one crime in a single count, and we conclude it was not duplicitous.

Amendment to Indictment

¶10 In the same vein, Abel argues the trial court abused its discretion when it allowed the state to "amend count one of the indictment after the close of evidence to charge crimes that had not been presented to the grand jury."[5] We review a trial court's decision to allow an amendment to the indictment for an abuse of discretion. *See State v.*

[5]The state responds that count one was never amended because its wording never changed throughout the course of trial. But Abel appears to be arguing that because the evidence supporting count one was different at trial than it had been before the grand jury, the indictment was improperly amended by allowing the jury to consider count one on different evidence.

Delgado, 174 Ariz. 252, 254, 848 P.2d 337, 339 (App. 1993). An indictment "may be amended only to correct mistakes of fact or remedy formal or technical defects," and the indictment "shall be deemed amended to conform to the evidence adduced at any court proceeding." Ariz. R. Crim. P. 13.5(b); *accord State v. Johnson*, 198 Ariz. 245, ¶ 5, 8 P.3d 1159, 1161 (App. 2000). However, the indictment cannot be amended "to charge new and different matters of substance without the concurrence of the grand jury." *State v. O'Haire*, 149 Ariz. 518, 520, 720 P.2d 119, 121 (App. 1986). "The defendant bears the burden of showing that he or she has suffered actual prejudice from an amendment." *Johnson*, 198 Ariz. 245, ¶ 8, 8 P.3d at 1162.

¶11 The amendment of one of the counts in *Johnson* was impermissible because the defendant had not been given adequate notice of the charges when the state originally had charged him with penile/vaginal intercourse, amended the indictment to charge him with penetrating the victim's vagina with his finger, and then the victim testified at trial that the defendant had inserted his penis into her vagina. *Id.* ¶¶ 2-3, 9. But C.'s testimony at trial was not so inconsistent with the evidence that had been presented to the grand jury with regard to count one such that Abel was convicted of a "new and different matter[] of substance without the concurrence of the grand jury." *O'Haire*, 149 Ariz. 518, 520, 720 P.2d 119, 121. Count one of the indictment was based on evidence that C. had rubbed his penis. At trial, C. testified Abel had asked her to rub his penis and she had refused, but that she had touched his penis one time with her fingers. Unlike the defendant in *Johnson*, Abel

had notice of the charges he was defending against because they generally involved C. touching his penis with her hand, even though the manner in which C. alleged she had touched it was different than what was presented to the grand jury. And Abel's defense—that he innocently let C. touch his penis once after she relentlessly pursued him and that the other incidents never happened—could not have been prejudiced by the amendment of the indictment. *See State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (allegedly duplicitous indictment not prejudicial to defense that offenses never occurred at all); *State v. Ramsey*, 211 Ariz. 529, ¶ 7, 124 P.3d 756, 760 (App. 2005) (lack of specificity in indictment for continuous sexual abuse of a minor could not have prejudiced defense based entirely on denial that acts occurred); *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (any defect in dates alleged in indictment did not prejudice sole defense that victim was lying). Accordingly, the trial court did not abuse its discretion in allowing the indictment to be amended to conform to the evidence at trial.

Sufficiency of Evidence

¶12 Abel next argues that the state presented insufficient evidence of an essential element of child molestation on count one. A trial court should grant a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., "only where there is no substantial evidence to warrant conviction." *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). This court "will find reversible error based on insufficient evidence only where there is a complete absence of probative facts to support a conviction." *Id*. In doing so, we must

ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶13 The elements of child molestation are that a person intentionally or knowingly engages in or causes another person to engage in touching, fondling, or manipulating of another's private areas with a child under the age of fifteen. A.R.S. §§ 13-1401, 13-1410. Abel argues the state presented insufficient evidence that he *caused* C. to touch his penis. Abel relies on testimony that we cannot find in the trial record. He contends C. "specifically denied" Abel had asked her to touch his penis. But the pages of the transcript he cites do not support this contention, nor do we find support for it in the remaining portions of C.'s trial testimony. Rather, C. testified that it had been Abel's idea that she touch his penis.

¶14 When the word "cause" is used as a verb, as it is in A.R.S. § 13-1401(2), it means, to "make happen; bring about; effect." *The American Heritage Dictionary* 249 (2d college ed. 1982). Thus, C.'s testimony that it was Abel's idea that she touch his penis was sufficient evidence from which the jury could have concluded beyond a reasonable doubt Abel had "caused" C. to engage in sexual contact. *See State v. Dixon*, 216 Ariz. 18, ¶ 7, 162 P.3d 657, 659 (App. 2007) (we do not look beyond plain language of statute unless

unclear, and in examining the plain language, we give words their ordinary meaning). We find no error in the denial of Abel's motion for judgment of acquittal on count one.[6]

Count Two

¶15 Abel argues his conviction on count two must be vacated because he was convicted of a charge that was never presented to the jury.[7] The clerk read the indictment to the jury at the beginning of trial and stated, as to count two, that Abel had molested C. by "knowingly allowing C[.] . . . to touch his genitals with her hand." But the form of verdict required the jury to determine whether the state had proven Abel had molested C. by rubbing his penis on her genitals, "as charged in Count Two of the Indictment."

¶16 First, we note Abel did not object to the form of verdict. *See* Ariz. R. Crim. P. 21.3(c); *State v. Hernandez*, 191 Ariz. 553, ¶ 33, 959 P.2d 810, 817-18 (App. 1998). Therefore, Abel is only entitled to relief if he establishes fundamental error occurred and that this error was prejudicial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Abel has not sustained his burden because he has not explained how the conflict between the count's number on the verdict form and the count's number as read

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[6]Regardless of whether the touching was C.'s idea, as Abel unpersuasively suggests, he nevertheless does not dispute he participated, and therefore "engaged in" those acts, as prohibited by the statute.

[7]Abel has not articulated the standard of review applicable to this issue beyond a vague assertion that the trial court abused its discretion in allowing the state's amendment to the indictment. *See State v. Delgado*, 174 Ariz. 252, 254, 848 P.2d 337, 339 (App. 1993).

to the jury before trial caused him to suffer prejudice. Although the charge involving Abel rubbing his penis on C.'s genitals was not read to the jury as count two, it was read to the jury at the beginning of trial as count six. Therefore, Abel was given notice of the charge. And, he cites no authority to support the proposition that what amounts to no more than renumbering the count was more than a formal or technical amendment of the indictment. *See, e.g.*, *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (error as to date of offense technical defect); *State v. Olea*, 182 Ariz. 485, 490, 897 P.2d 1371, 1376 (App. 1995) (deletion of superfluous language technical amendment). We find no error.

Count Four

¶17 Abel argues his conviction on count four "resulted from a fatal variance between the charge in the indictment and the proof adduced at trial." Again, we review the trial court's amendment of the indictment for an abuse of discretion. *See Delgado*, 174 Ariz. at 254, 848 P.2d at 339. Abel argues because he was charged with that count based on testimony that he had touched C.'s genitals with his fingers in the back bathroom and C. testified instead that the incident occurred in the adjoining bedroom, he "was tried for an offense which was not presented to the grand jury."

¶18 But the amendment of the indictment did not change the nature of the charge and was therefore, permissible. *See State v. Marshall*, 197 Ariz. 496, ¶ 39, 4 P.3d 1039, 1049 (App. 2000) (facts merely mentioned in indictment do not become elements of offense and as long as amendment "does not result in a different crime being charged," indictment

deemed amended to conform to evidence actually adduced at trial). And, as we discussed above with respect to count one, Abel's all-or-nothing credibility defense could not have been hampered by the amendment. *See, e.g., State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (allegedly duplicitous indictment not prejudicial to defense that offenses never occurred at all); *State v. Ramsey*, 211 Ariz. 529, ¶ 7, 124 P.3d 756, 760 (App. 2005) (lack of specificity in indictment for continuous sexual abuse of a minor could not have prejudiced defendant when defense based entirely on denial that acts occurred). We find no abuse of discretion.

Sentencing

Continuance

¶19 Abel argues the trial court erred when it denied his request for a continuance of his sentencing. Whether to continue a sentencing hearing is within the discretion of the trial court and we will not reverse its decision absent an abuse of that discretion. *See State v. Schackart*, 190 Ariz. 238, 254, 947 P.2d 315, 331 (1997). Abel contends that because the sentencing judge was different than the trial judge and "had not heard the facts at trial," the sentencing judge "could not without additional information make a proper determination of whether the sentences on the counts of conviction should be concurrent or consecutive."[8]

[8]As noted earlier, Abel was convicted after a jury trial was held in 1995 in his absence. A warrant issued for his arrest at that time, but he was not apprehended until February 2006.

¶20 At the sentencing hearing, Abel moved to continue the matter a second time, his counsel explaining that although he had had time to review the trial record, he needed more time to provide the court with a supplemental pleading on potential legal issues about the validity of Abel's convictions. The state objected to the continuance, arguing Abel had already been granted a thirty-day extension of time, and he was raising issues that were appropriate for appeal, not sentencing. The court agreed the potential issues Abel was raising were "issues that should be taken up on appeal," and proceeded with sentencing.

¶21 The court stated that in preparing for the sentencing, it had reviewed the presentence report, its addendum, a pretrial services report, and letters from Abel and members of his family. The state then argued, *inter alia*, that consecutive sentences were required under A.R.S. § 13-604.01. Abel responded that because his convictions were for child molestation involving one victim, the court had discretion under the relevant statute to impose concurrent sentences.[9] The court then sentenced him to presumptive, consecutive, seventeen-year prison terms on each of the three counts. After doing so, it stated it was

[9]The relevant statute was amended effective January 1994; consecutive sentences are no longer mandatory when the convictions involve molestation of only one victim. *See* 1993 Ariz. Sess. Laws, ch. 255, § 8. The offenses were alleged to have been committed between August 1993 and June 1994, with no specification of exact dates. Therefore, we presume the amended statute would apply to Abel's convictions, and the state does not argue otherwise. *See* A.R.S. § 1-246; *State v. Fell*, 210 Ariz. 554, ¶¶ 22-23, 115 P.3d 594, 600 (2005) (acknowledging general rule defendant sentenced under statute in effect at time crime committed).

"running those sentences consecutively in the Court's discretion based on the information contained before the court in the presentence reports."

¶22 Abel suggests the trial court misunderstood the law and imposed a consecutive sentence because it erroneously believed it had no other choice. But, we presume the sentencing judge knows and applies the correct law when sentencing a defendant. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997); *State v. Powers*, 200 Ariz. 123, ¶ 20, 23 P.3d 668, 673 (App. 2001). Moreover, the court stated it was exercising its discretion in imposing consecutive sentences, suggesting it believed it had the discretion to do otherwise. *See* 1993 Ariz. Sess. Laws, ch. 255, § 8 (sentence for child molestation pursuant to dangerous crimes against children "shall be consecutive to any other sentence imposed on the person . . . if the offense involved more than one victim").

¶23 Abel has thus not demonstrated that the trial court's refusal to grant a second continuance of his sentencing resulted in the trial court's confusion on any issue relevant to the sentencing process. We reject Abel's argument that the trial court abused its discretion when it proceeded with sentencing when it did.

Consecutive Punishment for Different Crimes Arising from Single Act

¶24 Abel argues the trial court erred by failing to "conduct a *Gordon/Arnoldi* analysis to determine the appropriate sentence."[10] We generally review de novo whether

[10]*State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989); *State v. Arnoldi*, 176 Ariz. 236, 860 P.2d 503 (App. 1993).

consecutive sentences are permissible under A.R.S. § 13-116, which prohibits consecutive sentences for convictions on separate crimes arising from a single act. *See State v. Siddle*, 202 Ariz. 512, ¶ 16, 47 P.3d 1150, 1155 (App. 2002). But Abel was not charged with different crimes for a single act. *See, e.g., State v. Arnoldi*, 176 Ariz. 236, 240-42, 860 P.2d 503, 507-09 (App. 1993) (finding consecutive sentences improper on convictions for sexual conduct with a minor and child molestation when based on a single act). Rather, the state presented evidence that Abel had committed three separate acts of molestation, and he was convicted of three counts of child molestation arising from those separate acts. Therefore, the trial court did not err by failing to conduct a *Gordon/Arnoldi* analysis.[11] *See State v. Taylor*, 160 Ariz. 415, 421, 773 P.2d 974, 980 (1989) (consecutive sentences proper when each conviction for sexual exploitation of minor based on "separate photograph[, which] constitutes a separate violation based upon a distinct act and is punishable as such"); *State v. Robinson*, 153 Ariz. 191, 205, 735 P.2d 801, 815 (1987) (§ 13-116 does not apply to defendant convicted of two separate sexual acts with two different victims); *State v. Griffin*, 148 Ariz. 82, 85, 713 P.2d 283, 286 (1986) (no violation of statutory prohibition of double punishment when defendant convicted of "four separate and distinct acts of sexual assault"); *State v. Devine*, 150 Ariz. 507, 510, 724 P.2d 593, 596 (App. 1986) (consecutive sentences proper when "each felonious act was committed independent of the other and was

[11]Abel did not request the court undertake such an analysis and therefore, we review for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

completed prior to the beginning of the next act"). Because we find no error at all, Abel has not sustained his burden of establishing fundamental error occurred and that such error was prejudicial. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶25 For the foregoing reasons, we affirm Abel's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge